

Open Meeting Law

**Town of Lunenburg
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Purpose



“The open meeting law is designed to eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based.”

Ghiglione v. School Committee of Southbridge,
376 Mass. 70, 72 (1978)



Overview of Presentation



- Introduction to the “New” Open Meeting Law, Definitions
- What Discussions are Subject to the Law
- E-mail Communications
- Meeting Notices
- Conducting the Meeting
- Executive Sessions
- Minutes
- Enforcement by the Division of Open Government



Open Meeting Law ("OML")

● Basic Facts

- Open meeting, public records and conflict of interest laws ("sunshine laws") exist in virtually every state
- Purpose of such laws is to eliminate much of the secrecy surrounding deliberations and decisions on which public policy is based

● MA OML (G.L. c.30A, § § 18-25)

- In Massachusetts, the OML was revised as part of the 2009 Ethics Reform Bill (replaced OML G.L. c.39, § § 23A-23C)
- Effective July 1, 2010



Overview of Revised OML

- Centralizes enforcement in Attorney General's Office
- Alters important statutory definitions:
 - Deliberation
 - Meeting
 - Governmental body
- Imposes new requirements for: distribution of OML materials to members of public bodies; notices, minutes, executive sessions, exemptions, member participation and related administrative matters



Certification



- Within 2 weeks of qualifying for office, acknowledge receipt of:
 - OML Regulations and Educational Materials promulgated by AG (pursuant to G.L. c.30A, §25)
 - Retained as public record



Definition: Meeting



“[A] deliberation by a public body with respect to any matter within the body’s jurisdiction...” with certain express exceptions.



Definition: Meeting (cont.)

- Specifically excludes:
 - A quorum at an on-site inspection so long as members don't deliberate
 - Attendance by a quorum at a conference or training program or a media, social or other event so long as members don't deliberate

Definition: Meeting (cont.)

- Specifically excludes:
 - Attendance by a quorum at meeting of another governmental body that has complied with the notice requirements of the OML so long as the visiting members communicate only by open participation in the meeting of those matters under discussion by host body as would others, and do not deliberate



Meeting (cont.)



- Specifically excludes:
 - Ministerial acts, such as signing documents, which may take place outside of a meeting when the terms have previously been discussed and voted on at an open meeting.
 - E.g., OML 2012-69 (Carver) - OML violation where a quorum of the School Committee stepped outside a meeting of the Board of Selectmen to discuss an alternative to a ballot question relating to funding a school project



Meeting (cont.)



- E.g., OML 2011-16 (Wayland) - Board violated OML where a quorum of the Board met to co-host a public forum with the Recreation Commission but failed to post notice. AG found that the public forum constituted a meeting of the Board because the Board deliberated by sitting together as a quorum at the front table facing the audience and addressing issues raised by members of the public that were within the jurisdiction of the Board. Board members also addressed each other directly and responded to comments made by other Board members and therefore, went beyond the "open participation" contemplated by the meeting exception.
- E.g., OML 2012-22 (Wayland) - PSBAC violated OML when it failed to post notice of a meeting, at which time the PSBAC appeared as an applicant before the Wayland Historic District Commission (HDC) for a Certificate of Appropriateness. AG held that Committee members were not merely taking part in "open participation," rather members of the HDC and the PSBAC together discussed the relevant application and decided how some incomplete details on the application should be filled out in order to move the process forward.



Meeting (cont.)



- E.g., OML 2011-26 (Wayland) - Board violated the OML when a quorum of the Selectmen intentionally engaged deliberation about their preferences for candidates to fill positions on the HDC and came to collective decisions prior to the commencement of its meeting.
- E.g., OML 2012-69 (Carver) - School Committee was found to have violated the OML where a quorum of the Committee stepped outside a meeting of the Board of Selectmen to discuss an alternative to a ballot question relating to funding a school project.
- E.g., OML 2015-32 (West Stockbridge) - The Board of Health did not violate the OML as there was no evidence suggesting that any deliberation occurred between members of the Board of Health, rather one member worked with a non-member Health Agent to prepare various notice letters to the public.



Meeting (cont.)



- A “**Rotating Quorum**” defeats the purpose of the OML.
 - Boston City Council violated the OML by deliberating at a series of meetings at which less than a quorum was present. McCrea v. Flaherty, 71 Mass. App. Ct. 637 (2008).



Meeting (cont.)



- **“Serial Meeting”** – a series of phone calls by the Chair to other members of the Board on a substantive matter constituted active solicitation of an opinion and violated the OML. OML. 2014-76.

Meeting (cont.)



- **Practical Considerations:**

- Post follow-up meeting of board or committee if members anticipate that they might want to discuss matters amongst themselves or respond to matters raised
- Do not drive to meeting together, sit together, or talk to each other during the meeting
- If a member wishes to speak, should be clear that the member is not representing the public body, but instead speaking as an individual
- Post “joint” meeting to be held at same time and place



Definition: Public body

- “[A] multiple-member board, commission, committee or subcommittee within . . . any county, district, city, region or town, however created, elected, appointed or otherwise constituted, established to serve a public purpose; ...and provided further, that a subcommittee shall include any multiple-member body created to advise or make recommendations to a public body.”



Public body (cont.)



- **Subcommittee** - any multiple-member body created to advise or make recommendations to a public body
- **Excludes** committees or subcommittees created by sole officer who has authority to act independently, i.e., the so-called “Connelly Rule”
- The focus of the rule is on the manner in which the committee is created, either formally or informally, rather than on who created it.



Public body (cont.)



- To determine whether the Committee is a public body subject to the OML, there are three factors the AG considers that apply to all public bodies:

- 1) The entity must be "within government and not excluded from the definition of "public body";
- 2) The entity must be a "body," empowered to act collectively; and
- 3) The entity must serve a "public purpose."

OML 2015-83 (Natick)

Public body (cont.)



- E.g., OML 2012-28 (Montague) - AG found that a Bylaw Review Committee consisting of seven members, including the Town Administrator, Town Clerk, Building Inspector, Town Planner, Conservation Agent, Director or Public Health, Police Chief and Superintendent of Public Works was a sub-committee subject to the OML because it was created by a vote of the Board of Selectmen. AG specifically found that the **same group would not be subject to the OML if assembled by the Town Administrator.**
- E.g., OML 2015-28 (Marshfield) - AG found that a group of private citizens assembled by special town counsel to advise on proposed bylaw changes was not a public body because they were not formally assigned to a particular charge, they were not empowered to act collectively, there was not set membership and no quorum requirement.



Public body (cont.)



- E.g., OML 2014-46 (Wayland) - Committee's bargaining team was not a public body subject to OML, thus it was not required to comply with the Law's procedures. Bargaining team communicated the substance of its discussions to the entire Committee, made no formal recommendations to the Committee, nor was it charged with any specific decision-making or policy advisory authority. Team was also not charged with making specific concrete proposals as that power remained with the Chief Negotiator.
- E.g., OML 2015-41 - AG determined that the Fall River Community Development Agency, established to distribute certain HUD funds, was led by an Executive Director with sole discretion over distribution of funds and was therefore not a multiple-member body subject to OML.



Definition: Deliberation

- “[A]n oral or written communication through **any medium**, including electronic mail, **between or among a quorum** of a public body **on any public business** within its jurisdiction...,” with certain express exceptions.

Deliberation/E-mails (cont.)

- Includes e-mail communications
- Includes serial conversations
- Specifically excludes:
 - Distribution of meeting agenda and materials
 - Scheduling information
 - Distribution of other procedural meeting materials, reports or documents that may be discussed

Provided that no opinions of governmental body are expressed.



Deliberation/E-mails(cont.)

● Email Communications:

- Now explicitly addressed in OML
- A quorum of the members of a public body may not use e-mail to share their ideas, feelings, opinions, beliefs, whether serially or in a single e-mail
- Members of a public body may not use a non-member, such as a staff member, to facilitate communication on matters the body would otherwise have to discuss at a public meeting

Deliberation/E-mails (cont.)

● **Electronic Participation Prohibited:**

- Recently, alternative electronic communications have also become more prevalent, including blogging, instant messaging, texting, social networking such as Facebook, and Twitter.
- Communications among a quorum on these types of services *also appear to implicate the OML*.

Deliberation/E-mails (cont.)

- Potential for violation:
 - An e-mail, voice mail, IM, posting, or blog originally addressed to one member of a public body subsequently forwarded to, or reviewed by a quorum of members;
 - An e-mail, voice mail, IM, posting or blog sent to a quorum of members of a public body;
 - A web-based discussion group, chat room or social networking site where a quorum is participating, whether contemporaneously or in serial fashion.

Deliberation/E-mails(cont.)

- E.g., OML 2013-127 (Wayland) - Committee violated OML by deliberating over email whereby one member sent all the Committee members an email with his comments on the warrant article and wrote, "I welcome all comments and suggestions either prior to or at tomorrow's meeting." AG noted that members should not have expressed opinions about the substance proposed warrant articles outside of open session.
- E.g., OML 2013-6 (Wayland) - OML violation of individual member found, rather than Board as a whole, where one member sent emails to a quorum of the Board expressing his opinions on substantive matters of public business, rather than administrative tasks, within the Board's jurisdiction but where there was no evidence that any Board member responded substantively to the emails.



Deliberation/E-mails (cont.)

- E.g., OML 2013-5 (Wayland) - Board did not violate OML by engaging deliberation of the town administrator's professional competence through the exchange of written communications prior to an open meeting. AG determined that although the compiling of evaluations through emails was a permissible and necessary function for public bodies to conduct ahead of meetings, so long as discussion of the evaluations occurred during an open meeting.
- E.g., OML 2013-4 (Wayland) - Board did not violate OML where one Selectman distributed a document to be discussed at the Board's meeting via email but the email did not contain any advocacy by the Selectman, did not invite comment from other Board members, and no comment was provided; such action constituted an administrative task permitted by OML.
- OML 2015-31 (Chatham) the Charter Review Committee violated the OML when the Chair e-mailed the committee a PowerPoint presentation for discussion at the next Committee meeting and solicited advice on whether the presentation should include charter language. Three members replied to the e-mail with two replying to the full Committee.



Deliberation/E-mails (cont.)

- E.g., OML 2011-14 (Wakefield) Prohibited: exchange of e-mail in which members express opinions about substantive matters, even where such distribution is intended to be discussed at a future meeting; such “opinions” may be as limited as, “I suggest we go with this version based on Joe’s feedback”
- E.g., OML 2012-93 (Stow) - AG found that only one individual member of the School Building Committee violated the OML by e-mailing a quorum of members asking for comments on a power point. The committee members responding did not violate the law, according to the AG, because they did not “reply to all”
- E.g., OML 2014-2 (Minuteman Regional) - AG found that an opinion in an e-mail from a committee member to a private citizen constituted a deliberation because it was copied to a quorum of the committee



Deliberation/E-mails (cont.)

- E.g., OML 2013-01 (Melrose) - AG acknowledged that “it can be difficult to determine when a communication serves an administrative function and when it contains substantive discussion in violation of the law. **Our best advice continues to be that public bodies not communicate over e-mail at all except for distributing meeting agendas, scheduling meetings, and distributing documents created by non-members to be discussed at meetings.”**
- E.g., OML 2014-2 (Minuteman Regional) - AG advised that to **cure** a violation caused by deliberation through e-mail, the **entire e-mail must be read out loud at a duly noticed public meeting.**



Deliberation/E-mail (cont.)

- E.g., OML 2015-77 (Southwick) – AG found that while an individual who is not a member of a public body may facilitate violation, the Board did not violate OML where the Building Inspector sent emails a quorum of the Board because the messages were one-way communications from a non-member to the Board, rather than communication **between or among** a quorum.
- E.g., OML 2015-96 (Fitchburg) – Individual City Council member violated OML when he sent an email to a quorum of the Council and expressed the Councilor 's opinion on an issue within the Council's jurisdiction; AG explained that even if email was a "report" to be considered at an upcoming meeting, it should have been done **without the expression of an opinion by a public body member.**

Deliberation/E-mails (cont.)

- E.g., OML 2015-98 – Chair of Finance Committee did not violate OML where he attached to an e-mail his draft response to a Complaint and the text of the e-mail read: "This draft response is under review by Town Counsel. The complaint is also attached. FYI only, no discussion until our meeting next Wednesday. Thanks, Tom"; AG found the documents were distributed for the purpose of discussion at a future meeting, rather than for the purpose of expressing an opinion to the other Committee members, this did not violate the law.

Deliberation/E-mail (cont.)

- Practical considerations for board members include:
 - Don't ask for or express opinions, ideas, beliefs in an e-mail to other members
 - Never click on "reply to all"
 - Limit use of e-mail to scheduling purposes, and try to avoid using e-mail to undertake Town business
 - Assume that e-mail may be forwarded to unintended recipients, and therefore limit content to business matters; be prepared to read e-mail in local newspaper or blog



E-mails & Public Records

- E-mails and the Public Records Law
 - E-mails, even if not subject to the OML, **are public records** and subject to the maintenance and disclosure requirements imposed by law. G.L. c. 4, §7, clause 26 (definition of public records and exemptions); G.L. c.66, §§8, 10 (retention and disclosure requirements, respectively).

E-mails & Public Records (cont.)

- Municipal officials must be reminded of the applicability of the Public Records Law to retention of e-mail .
 - All public records must be maintained for either a period of seven years, or for the amount of time specifically provided in an applicable records disposal schedule approved by the Supervisor of Records. G.L. c.66, §8.
 - the Administration and Personnel retention schedule provides that “correspondence,” which term could include e-mail depending on the content of a particular e-mail, must be maintained for a period of two years only if the content of the e-mail contains “no informational or evidentiary value.”
 - Subject to very few exceptions, the written approval of the Supervisor of Records must be sought prior to destruction of any public record. G.L. c.66, §8.



Public Records – 2016 Ballot Question

- Secretary of State William Galvin unveiled a 2016 ballot question that he says will “beef up the law” and streamline its enforcement.
- If this proposed law passes, it would amend the existing state public records law by increasing transparency and access, reducing costs, streamlining responsiveness and creating greater penalties for failure to comply with the law.
- The new law would take effect on January 1, 2017.



Public Records – Pending Bills

- There are also numeral bills pending relative to public records. Generally, the majority of the proposed bills:
 - Cap fees for public records;
 - Permit requesters to request documents electronically;
 - Permit requesters to receive documents electronically;
 - Require state agencies and/or municipalities to designate “records access officers”;
 - Provide more time to respond to requests (15 days instead of 10);
 - Provide standards for electronic record keeping systems or databases;
 - Impose higher fines for refusal or neglect in providing public records;
 - Give public records cases priority over other proceedings in state courts; and
 - Permit the courts to grant attorney’s fees to requesters who “substantially” prevailed.



E-mails & Litigation (cont.)

- OML Privileges **DO NOT** apply to discovery in the context of litigation.
 - While certain e-mails are not subject to the OML, **all e-mail** (including those sent/received at personal e-mail addressees) **may be subject to discovery** as “electronically stored information”, pursuant to the Amended Massachusetts Rules of Civil Procedure. Mass. R. Civ. P. 26(f).
 - As of January 1, 2014, electronic discovery is applicable to **all** trial courts in Massachusetts.



Your Next E-mail Could Be On The Front Page!

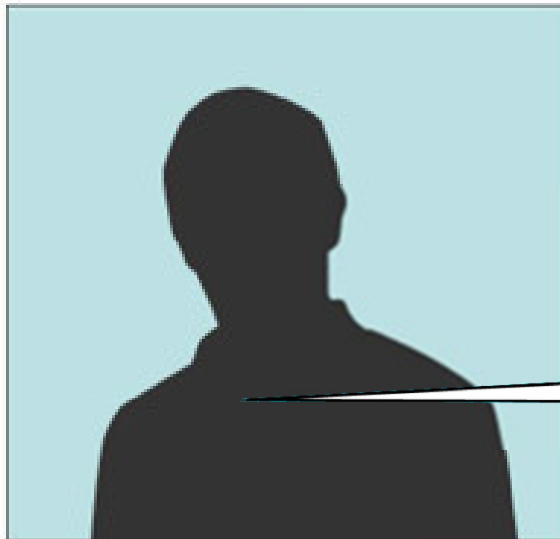
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Your E-mail
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Deliberation/E-mails (cont.)

- Practical considerations for board members include:
 - Assume that all e-mails may be produced to unintended recipients, and therefore limit content to business matters; be prepared to read e-mail in local newspaper or blog
 - Limit use of e-mail to scheduling purposes, and try to avoid using e-mail to undertake Town business
 - Use town e-mail server for remote participation instead of private e-mail.



Scheduling Meetings: Notice

● Timing:

- Requires notice to be posted at least 48 hours in advance of meeting, **excluding** Saturdays, Sundays and legal holidays
 - Notice **must state both the date and time that the Notice is posted**. OML 2015-43 (Carver); 2015-81 (Plymouth)
 - If revised, must state both the date and time of the original posting and the date and time of the revised posting. OML 2015-43 (Carver)
- Although the OML is silent with regard to the time that meetings must be held, the AG “encourages” public bodies to schedule their meetings at a time that permits maximum attendance of public body members as well as the public. OML 2013-2 (Melrose)



Notice (cont.)



● **Manner:**

- Must be filed with Town Clerk and posted in manner conspicuously visible to the public at all hours in or on municipal building housing clerk's office; AG's regulations now allow posting on website; AG must be notified



Notice (cont.)



- Practical Implications
 - For a Monday meeting, notice must be posted on Thursday
 - If Monday is a holiday, a Tuesday meeting must also be posted on Thursday
 - Clerk should time stamp notice to ensure accurate record exists of filing
(Required)



Notice (cont.)



- Practical Implications

- If posting is made in an “alternate location”, notice must be timely posted in both locations
- A meeting may not be continued from one night to the next unless the meeting is properly posted under the OML
- The notice required under the OML **does not substitute for or otherwise supersede** notice requirements under other applicable laws



Notice (cont.)



- “Emergency” for purposes of OML:

- Threat to public health and safety
- Exception to 48 hour requirement; however, OML requires posting “as soon as reasonably possible”

**E.g., OML 2015-85 (Swansea) - The inability to convene a quorum of a body prior to a deadline may be unexpected, but is not "a sudden or generally unexpected occurrence" under OML..*

- Practical recommendations:

- Comply with the law to the extent possible
- Limit deliberations to emergency matter
- Take minutes of meeting, and review and include with minutes of next regularly scheduled meeting.
- When posting emergency meeting, consider posting a regular meeting as well, to allow body to ratify the action taken at emergency meeting.



Notice (cont.)



● Content of Notice:

- Notice shall include “a listing of topics that the chair reasonably anticipates will be discussed at the meeting”
- This requirement has been interpreted by the AG to mandate that the notice include a listing of the particular items to be discussed, rather than general topics of discussion; must be detailed
- The AG has found that notice includes sufficient specificity when a reasonable member of the public can read the topic and understand the anticipated nature of the discussion
- AG advised that notice should not include abbreviations that are not commonly understood. OML 2015-101.
- Notice, at a minimum, should identify the specific statutory executive session purpose rather than the general section of the authorizing executive sessions. OML 2015-106.



Notice (cont.)



- E.g., OML 2014-141 (Wayland) – AG concluded that School Committee violated law by failing to include in notice of meeting name of non-union personnel with whom it would be negotiating
- E.g., OML 2013-1112(Wayland) – AG found that topics such as “New Business”, “Old Business” and “Invoice Approval” were not sufficiently detailed
- E.g., OML 2013-174 (Wayland) The AG determined that “Review Town Administrator Contract and Job Description” was not sufficiently detailed to inform the public about the possibility of terminating the Town Administrator.
- E.g., OML 2015-8 (Ayer) – AG found that topics listing DEP file number but not street address were insufficiently detailed because the addresses could not easily have been discovered



Notice (cont.)



- E.g., OML 2013-187 (Orange) – Although meeting notice informed the public that a change to regulations would be discussed, it was not sufficiently detailed because it did not specify that the discussion would be a public hearing.
- E.g., OML 2011-9 (Natick) – Failing to include specific details of proposed vote on Town Meeting warrant articles where School Committee simply listed “Town Meeting Update”; AG recommended that notice should have said, “Discussion of Town Meeting Warrant Articles 1, 9, 10, 18, 32, 33 and 35”
- E.g., OML 2011-11 (Freetown) – AG concluded that notice for Soil Board hearing was deficient where it listed “Renewal of Fall Soil Permits”, as it reasonably anticipated that particular permits would be considered and “it should take the additional step of listing into the meeting notice the **details of those specific permits**, including the name of the applicant and the location under consideration.”



Notice (cont.)



- E.g., OML 2015 - 49 (Peru) – Listing "Interview Town Administrators" on notice was insufficient where the Board knew the names of the candidates being interviewed at the time of posting and planned to interview them in open session; AG advised that the **candidates' names should have been listed**. "[R]eview and approve warrants" was not specific enough and did not include any information about the specific warrants reviewed.
- E.g., OML 2015 – 66 (Southborough) – OML not violated where notice did not specify that the Board may take a vote because the vote that occurred flowed naturally from the Board's consideration of a posted agenda item; AG states "It is reasonably foreseeable that a public body may hold a vote following discussion of a topic listed on a meeting notice."
- E.g., OML 2015-74 (Fairhaven) - "Membership Issues" on notice sufficiently described the anticipated discussion of the various membership issues, such that any member of the public had sufficient information to decide whether to attend the meeting.



Notice (cont.)



- E.g., OML 2015-87 (Wareham) – OML violated where Board meeting notice failed to list "Open Session" as a topic and only included only an executive session topic as this did not indicate to the public that the Board would first convene in open session; AG explained “[w]hen the only business to be discussed during an open session is the procedural requirements for entering executive session, listing "open session" on the meeting notice is the only means by which members of the public are informed that a public body will, in fact, hold an open meeting that they are permitted to attend.”
 - However, where additional open session topics are included in a notice, it is clear that the public body will first convene in open session, thus a separate topic reading "open session" is unnecessary. OML 2015-98 (Wayland)

Notice (cont.)



● Practical Implications

- If a matter does not appear on the meeting notice, and the Chair did not reasonably anticipate the matter would be discussed at meeting, the law does not prohibit consideration of same
- However, AG recommends that unless matter requires immediate action, matter not appearing on meeting notice should be put off to later meeting for which posting includes matter



Notice (cont.)



- Practical Implications
 - If a matter is brought to attention of Chair after notice has been posted, to the extent feasible, meeting notice may be updated to include such matter - useful to implement procedure/policy with respect to updating notice to clearly indicate time and content of update
 - May not be possible to update if staff cannot reach Chair, and/or if Chair discovers matter shortly before meeting



Notice (cont.)



● Public Comment

● E.g., OML Letter 5-4-11 (Sturbridge) - Where matter not listed on meeting notice was raised by member of public and not reasonably anticipated, no violation found; however AG “strongly encourag[ed] . . . [Board] not to consider topics that may be controversial or of particular interest to the public until the topic has been properly listed in a meeting notice in advance of a meeting.”

● E.g., OML 2015-4 (Marshfield) – discussion and informal vote on matters raised during public comment do not violate OML.



Scheduling Meetings: Location

- Location of meeting **must** be included in notice
- Location of meeting **must be accessible**; required both by the OML and the ADA
- **Practical considerations** include:
 - Ability to meet in privately owned location
 - Moving meeting to different location (e.g., unanticipated attendance)
 - Closing door during open session

Location (cont.)



- E.g., OML 2012-46 (Melrose) - AG concluded the School Committee Superintendent Search Committee violated the OML where meeting was held in locked area of high school, and the public was unable to gain access once greeter “left”.
- E.g., OML 2015-92 (MassDOT) - Policy requiring members of the public present photo ID in order to access a meeting of the Board did not violate OML; AG explained that “a public body must also be able to take reasonable steps to ensure the safety and good order of public meetings”; AG cautioned that security policies may not be used as a pretext for unlawfully excluding certain members of the public from open meetings and reminded Board of its obligation to take reasonable steps to accommodate members of the public.



Conducting Meetings: Public Session

- Practical considerations with public participation:
 - Allow? **NOT required by OML** OML 2015-12 (Sudbury)
 - Beginning or end of meeting?
 - Controls:
 - Protect individual rights
 - Don't try to resolve issues at time; consider adding issue as agenda item at future meeting
 - Avoid debate
 - Limit time per person and total time



Public Session (cont.)



- In OML 2012-48 the AG concluded that the West Brookfield Zoning Board of Appeals was not required to permit members of the public to participate in its meetings, and further that the Board was not required to accept petitions or agenda topics submitted by the public.



Conducting Meetings: Recording

- Under “new” OML, Chair must make public statement regarding audio or video recording if attendee intends to record (basis – MA wiretap statute)
- Recording by individuals:
 - Must inform the Chair
 - Chair must make required announcement
 - Chair may reasonably regulate recordings (placement, operation of equipment)
- “New”: An individual is entitled to create an independent record of an executive session at his/her own cost



Conducting Meetings: Remote Participation

- Prior to “new” OML, most District Attorneys interpreted OML as prohibiting remote participation by a board member
- Under new OML, remote participation authorized by AG by regulation, as long as “chair” and quorum are physically present
- All votes by roll call
- Chair must announce at beginning of meeting who is participating remotely and state reason why (personal illness or disability; emergency; military service; geographic distance)



Remote Participation (cont.)

- BOS must vote to allow Town boards to use; can impose additional limitations on use
- Quorum must be physically present
- Remote participants considered present and may vote
- Must be audible or visible to all in attendance
- May participate in executive sessions
- Local Commissions on Disabilities may vote to permit remote participation



Remote Participation (cont.)

- E.g., OML 2013-112 (Wayland) – OML violation where one members participated remotely during the meeting yet, the minutes did not reflect which of the five reasons outlined in 940 CMR 29.10(5) formed the basis for the remote participation nor did they note whether the vote that was taken was conducted by roll call but instead only stated the outcome was unanimous; the minutes also did not include the names of any members who participated remotely and did not state who chaired the meeting.

Executive Sessions (cont.)

- New OML has changed the following with respect to executive sessions:
 - Process for going into executive session
 - Required timeline for review and release of minutes

New Executive Session Requirement

- Before going into the executive session, the chair must state the purpose for the session, “stating all subjects that may be revealed without compromising the purpose for which the executive session was called”.
 - Executive session topics must be described, both in the meeting notice and in the announcement during open session, in as much detail as possible. OML 2015-112.
- The vote to go into executive session must still be by roll call vote. OML 2015-122.
- Must still state whether the body is returning to open session.



New Requirement (cont.)

- Practical Implications

- Public body must limit discussion in executive session to the matter(s) stated in the meeting notice (unless it was not reasonably anticipated by the Chair) and included in the vote to enter executive session



New Requirement (cont.)

- E.g., OML 2011-9 (Wayland) - OML violation where Board did not indicate the particular non-union personnel with whom it be negotiating
- E.g., OML 2015-55 (Wayland) - AG found that although the Committee's reason for entering executive session was proper, because identifying the Public Records Law as the statute requiring confidentiality would not have compromised the purpose for the executive session, the Committee should have cited to the Public Records Law in the announcement prior to convening in executive session.
- E.g., OML 2014-69 (Wayland) – OML violated where Committee discussed general compensation policy, rather than preparation for contract negotiations or negotiation with specific nonunion personnel and therefore, the AG found that this portion of the meeting should not have occurred in executive session.



New Requirement (cont.)

- E.g., OML 2014-42 (Wayland) - “Personnel” was not a sufficiently specific statement of the purpose for an executive session and therefore, found this to an intentional violation.
- E.g., OML 2011-54 (West Newbury) – Violation found where Board met in executive session to receive and discuss written communications from Town Counsel, listing “legal matters” on the meeting notice; Board at a minimum needed to specifically cite G.L. c.30A, § 21(a)(3) –strategy with respect to litigation
- E.g., OML 2012-39 (Amherst-Pelham)- School Committee violated OML by stating that it was entering executive session for “contract negotiations”, when it actually received an update on the status of collective bargaining negotiations; AG stressed that the precise reason for entering executive session must be stated and that such action was not a “mere technical violation”



Exemptions to OML



“1. To discuss the reputation, character, physical condition or mental health, rather than professional competence, of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual. ...”

- Adds right of individual to create independent record of session at own cost
- Meeting notice and vote need **NOT** refer to name of individual to be discussed



Exemptions(cont.)



- E.g., OML 2013-2 - AG acknowledged that exemption 1 allows public bodies to discuss reputation, character, etc. in executive session, but public bodies are not required to discuss such matters in executive session.
- E.g., OML 2012-119 - AG ruled that public bodies may discuss the resolution of OML complaints in executive session under exemption 1 because such complaints are complaints brought against public officers.
- E.g., OML 2015-40 – Board violated OML by entering into Executive Session to discuss the professional competence of the Town Administrator as part of a performance evaluation. AG noted that while contract and pay negotiations may be a topic proper for Executive Session, pursuant exemption 2, professional competence is specifically not protected under exemption 1.



Exemptions(cont.)



“2. To conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel;”

- OML requires that collective bargaining contracts negotiated in executive session be approved or ratified in open session. OML 2011-56.
- Public bodies may agree on terms with individual non-union personnel in executive session, but the final vote to execute such agreements must be in open session. OML 2013-194 and others.

Exemptions(cont.)



- 3. To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body *and the chair so declares ...***
- This includes the name of a case in litigation or the identify the collective bargaining unit if doing so would not compromise the litigation. OML 2015-69; OML 2015-87.
 - To justify an executive session to discuss litigation, the AG has stated that the mere possibility of litigation is not sufficient. Litigation must be pending or clearly and imminently threatened or otherwise demonstrably likely.
 - In OML 2012-116, the AG found that it was appropriate for the Nantucket Board of Selectmen and Planning Board to meet in executive session to decide whether to appeal a decision of the ZBA.



Exemptions(cont.)



6. To consider the purchase, exchange, lease or value of real property *if the chair declares* that an open meeting may have a detrimental effect on the negotiating position of the public body

* If entering executive session under exemptions 3 or 6, the public body cannot invite the “other side” to participate in the executive session. OML 2012-114.



Exemptions(cont.)



- Practical considerations:
 - If executive session is anticipated, it must be listed in appropriate detail on meeting notice, with such specificity as is possible without compromising purpose of the session.
 - Related vote to enter executive session must also include all information possible without compromising purpose of session (i.e., name of non-union personnel or union must be identified in notice and vote if bargaining or negotiations will be conducted; case name to be discussed under litigation strategy must be listed, unless doing so would compromise Town's position); **and declaration must be made, as needed**



Exemptions(cont.)



● Recommended Language for Executive Sessions:

- *Declaration by Chair:* I declare, under G.L. c. 30A, §21(a)(_), that the purpose of the executive session will be to _____ and that an open meeting may have a detrimental effect on the Board's bargaining/litigation position.
- *Motion by Member:* I move that the Board go into executive session pursuant to G.L. c. 30A, §21(a)(_), for the purpose and reasons declared by the Chairman and with the Board to return to open session thereafter.
- *Motion seconded by Member.*
- *Chair:* The Board will/will not be reconvening in open session.
- *Roll Call Vote to go into executive session.*
- *Roll Call vote to exit executive session.*



Conducting Meetings: Minutes

- **Must** include:

- Time, date, place, members present and absent
- Summary of the discussions on each subject
- Decisions made and actions taken, including a record of all votes
- List of documents and other exhibits used by the body at the meeting, which will be “part of record” but not attached to minutes



Minutes (cont.)



- The minutes must include a summary of the discussions of each topic. While a transcript of the discussion is not required, **minutes must be sufficiently detailed** to allow a person who was not in attendance to determine the essence of the discussion **and** what documents were used.
- The same rule applies to executive session minutes.



Minutes (cont.)



- ***They “have to reflect the discussion that occurred, the action taken by the body, and the positions taken by the individual members.”***
- E.g., OML 2011-34 – Committee failed to maintain sufficient minutes of its meetings where the members met in executive session for 2 ½ hours, settled on a process and timeline for the candidate search next University president yet, the minutes contain only eight sentences. The AG found the minutes were insufficient because:
 - 1) the sentences provided no detail about either the timeline or the process the committee planned to use to select the next University president;
 - 2) the minutes essentially contain only a statement about the need for confidentiality and the fact that a certain number of interviews were conducted;
 - 3) the minutes provide no summary of the interviews, no summary of the Search Committee's discussion to narrow the list of candidates to the finalists; and
 - 4) the minutes contained no record of any votes.



Minutes (cont.)



- E.g., OML 2015-49 - Minutes stating only that "[a] discussion regarding interview questions and procedures between the Selectboard and [candidate] takes place" was insufficient; minutes should have included details about the interview process, the hiring and proposed terms of employment of the chosen finalist and the interviews themselves.
 - AG also noted that although it is not necessary to record the comments of every speaker, if a particular individual speaks at some length or is the only one to offer an argument for or against a particular subject, those comments should be identified in the minutes.
- E.g., OML 2012-91 – OML violated where executive session minutes stated, "A lengthy discussion followed on each of the nine points[,] and all of the questions raised by the three selectmen were answered to their satisfaction"; such minutes were insufficient as they reference dialogue that occurred without giving further detail.



Minutes (cont.)



- E.g., OML 2014-150 - OML was violated where executive session minutes merely stated, "[a] personnel matter was discussed" as this was not a sufficiently detailed summary.
- E.g., OML 2012-101 - Assessors' executive session minutes, stating only whether an abatement was granted, the amount of the abatement (if granted) and the vote, were not sufficiently detailed because there was **no record of the discussion on each application**.
- E.g., OML 2014-54 - AG concluded OML was violated because **minutes did not include the place of the meeting**, and also because **included details about topics that were not in fact discussed but omitted discussions that did occur**.



Minutes (cont.)



- Minutes **must** include a list of documents used at the meeting. AG has established the following standards to determine if a document is “used”:
 - Document is physically present at meeting; and
 - Document is verbally identified; and
 - Content of document is discussed by members

OML 2012-42.



Minutes (cont.)



● "The **minutes of an open session**, if they exist and whether approved or in draft form, shall be made available upon request by any person within 10 days." G.L. c. 30A, § 22(b); OML 2015-50

● Although the law does not specify a time frame for approval of minutes, they **should be approved at the next meeting if possible**. OML 2014-1

- Approval of meeting minutes one month after the meeting is "timely," but two months is not. OML 2015-43.
- If staff resources are not available to create minutes for the Board to approve, then Board members must take on this responsibility to ensure compliance with the law. OML 2015-86



Executive Session Minutes

- Must be disclosed when purpose of exemption has been met, unless otherwise protected under the Public Records Law
- Must be reviewed periodically by chair or public body;
- Must be provided within 10 days in response to request, unless review not yet undertaken, in which case the minutes must be reviewed no later than the board's next meeting or 30 days, whichever occurs first



Executive Sessions Minutes(cont.)

- Open meeting minutes **shall not be withheld** under any of the exemptions to the Public Records Law, **except**:
 - “personnel information”
 - materials used in a performance evaluation of an individual bearing on his professional competence that were not created by members of the body for purposes of the evaluation; and
 - materials used in deliberations about employment or appointment of individuals, including applications and supporting materials and excluding resumes



Executive Sessions Minutes(cont.)

- Executive session minutes may be withheld in whole or in part, even after a final collective bargaining agreement has been reached, **if the public release of those minutes could have a detrimental effect on the public body's collective bargaining position in future negotiations.**
- However, such minutes may not be withheld indefinitely. At some point, the public interest in transparency will outweigh the potential for harm to the public body's future collective bargaining position.
- After each subsequent collective bargaining agreement is reached, therefore, the burden to release the executive session minutes of the older sessions increases.



Executive Sessions Minutes(cont.)

- E.g., OML 2015-62 (Wayland) - OML violation where executive session minutes were withheld that did not involve long-term strategy, but rather focused on strategy related to the specific collective bargaining agreements or non-union contracts being negotiated at the time.

Role of the Attorney General

- Oversees and enforces OML
- Promulgates rules and regulations; interprets OML; issues written letter rulings or advisory opinions
- Authority to:
 - Void action taken in violation of OML
 - Reinstate employee if violation is found regarding employment action



Enforcement Process



- Filing Complaint = Three steps:
 - Must first file written complaint with public body, within 30 days of alleged violation using form prepared by AG
 - Public body must forward complaint to AG within 14 business days of receipt and inform AG of any remedial action taken
 - Not less than 30 days after date complaint was filed with public body, complainant may file a complaint with AG



Enforcement (cont.)



- Public Body must consider complaint at properly posted meeting
 - Matter must appear on meeting notice
 - Body must acknowledge receipt of complaint
 - Should deliberate concerning allegations and possible resolution
 - Vote to resolve complaint
 - If appropriate, authorize response to be prepared and sent to Attorney General and Complainant



Enforcement (cont.)



- Remedial action Ordered by the AG may include:
 - making minutes of improperly called or held executive session public by including them as an addendum to minutes at a properly called meeting, or filing with Town Clerk
 - creating minutes if the same were not properly created, or supplementing minutes if they were not sufficiently detailed
 - providing for public deliberation and voting on matters considered at an improperly called or held meeting



Enforcement (cont.)



- If public body cannot act to respond to complaint within statutory time frame, or if such action would be difficult based upon particular circumstances, the body may request an extension of the time from the DOG to respond
- To ensure that such request is viewed in a manner most favorable to the public body, extension request should be requested before expiration of statutory response time



Enforcement (cont.)



Cure:

Consistent with prior case law, the AG recognizes: “Public deliberation (at a properly posted open meeting) effectively cured the private discussion which occurred over email because it enabled the public to see the discussion that went into the creation of the policy. To cure a violation of the Open Meeting Law, a public body must make an independent deliberative action, and not merely a ceremonial acceptance or perfunctory ratification of a secret decision.” See OML 2011-14 (Wakefield School Committee)



Enforcement (cont.)



- Once a complaint is filed, the Attorney General must:
 - Determine whether there has been a violation
 - Hold a hearing before imposing civil penalty
 - In the event a violation is found, determine whether the public body, or one or more of its members, or both, are responsible, and whether the violation was intentional



Enforcement (cont.)



- Upon finding a violation, the AG may issue an order to:
 - Compel immediate and future compliance with OML;
 - Compel attendance at authorized training session;
 - Nullify in whole or in part any action taken at meeting;
 - Impose civil penalty upon public body of not more than \$1,000 for each intentional violation;
 - Reinstate employee without loss of compensation, seniority, tenure or other benefits;
 - Compel that minutes, records or other materials be made public; or
 - Prescribe other appropriate action



Enforcement (cont.)



● Judicial Review of AG Order

- A public body or any member aggrieved by order may file certiorari action in Superior Court within 21 days of receipt of order
- AG order stayed pending judicial review
- If AG order nullifies action, public body shall not implement action



Enforcement (cont.)



- Compliance

- AG may file action in Superior Court to compel compliance with order or payment of civil penalty

- Alternative procedure

- AG or 3 or more registered voters may initiate civil action in Superior Court to enforce OML



Enforcement (cont.)



● Defenses

- Compliance – The burden of proof is on the public body to show by a preponderance of the evidence that the action complained of was in accordance with and authorized by OML
- Advice of counsel defense to imposition of civil penalty: public body acted in good faith in compliance on advice of legal counsel



Resources



Attorney General's Office:

<http://www.mass.gov/ago>

Attorney General's Open Meeting Law Website:

<http://www.mass.gov/ago/government-resources/open-meeting-law/>

Secretary of the Commonwealth Public Records Law:

<http://www.sec.state.ma.us/pre/preidx.htm>



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